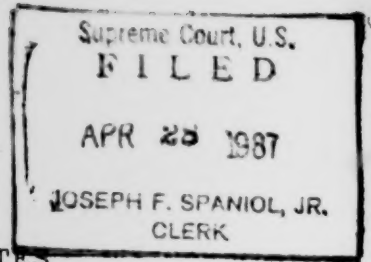


86 1731



IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1987

BRADLEY W. BEHRMAN,

Petitioner,

v.

VERONICA L. BEHRMAN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME JUDICIAL COURT OF THE
COMMONWEALTH OF MASSACHUSETTS

BRADLEY W. BEHRMAN

(pro se)

18275 Jamestown Circle

Northville, MI 48167

(313) 349-3675



QUESTIONS PRESENTED

1. Whether a defendant in a no-fault divorce case which was settled without a trial is entitled to a hearing before being ordered to pay a portion of plaintiff's counsel fees.

2. Whether a probate judge is required to explain the monetary basis of his award of counsel fees so as to make meaningful review possible.

PARTIES BELOW

The parties below were Bradley W. Behrman and Veronica L. Behrman.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISION INVOLVED.	2
STATEMENT	2
1. Background	2
2. Probate Court Order.	5
3. Appeals in State Courts	5
REASONS FOR GRANTING THE WRIT.	8
1. The Right of a Defendant to a Fair Hearing.	9
2. The Right of a Defendant to an Explanation	13
CONCLUSION	14

TABLE OF AUTHORITIES

Cases:	Page
<u>Behrman v. Behrman</u> , 23 Mass. App. Ct. 1104 (1986)	1
<u>Brown v. Brown</u> , 422 P. 2d 634 (1967). . .	9
<u>Citta v. Delaware Valley Hospital</u> , 313 F. Supp. 301 (1970)	12
<u>Fuentes v. Shevin</u> , 92 S.Ct. 1983(1972). .	9
<u>Jeffries v. Olesen</u> , 121 F. Supp. 463. .10	
<u>Lane v. Warden, Md. Penitentiary</u> , 320 F. 2d 179 (1963).	9
<u>Lee v. Lee</u> , 537 F. 2d 762 (1976). . . .13	
<u>Lindsey v. Normet</u> , 405 US 56 (1972) . .11	
<u>People v. Coates</u> , 59 NW 2d 83 (1953). . .9	
<u>People v. Weaver</u> , 412 NE 2d 1353 (1980) 9	
<u>Robbins v. Robbins</u> , 476 NE 2d, 230(1985) 6	
<u>Ross v. Ross</u> , 430 NE 2d, 815 (1982) . . 7	
Statutes:	
28 U.S.C. §1257	2
USCS Constitution, Amendment 14	2
Massachusetts G.L. c. 208	3
Rules:	
Massachusetts Appeals Court Rule 1:28 . .	6
Reference Books:	
<u>Black's Law Dictionary</u> , Fifth Edition p. 537 (West Pub.Co., 1979).	10

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1987

No. 87-

BRADLEY W. BEHRMAN,
Petitioner,
v.
VERONICA L. BEHRMAN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME JUDICIAL COURT OF THE
COMMONWEALTH OF MASSACHUSETTS

OPINIONS BELOW

The opinion of the Commonwealth of
Massachusetts Appeals Court's affirmation
of the Probate Court's order (App. A, pp.
A-1 - A-4, *infra*) is not reported, though
Summary Disposition is noted at 23 Mass.
App. Ct. 1104 (1986). The opinion of the
Probate Court (App. ^D~~A~~, pp. A-7 - A-10, *infra*)
is not reported.

JURISDICTION

The judgment of the appeals court was entered on November 28, 1986, and a timely petition for rehearing was denied on January 7, 1987 (App ^B X, p. A-5, infra). The Supreme Judicial Court for the Commonwealth of Massachusetts denied the Application for Further Review on January 28, 1987 (App. S, p. A-6, infra). The jurisdiction of this Court is invoked under 28 U.S.C. §1257.

CONSTITUTIONAL PROVISION INVOLVED

This case involves Section 1 of the Fourteenth Amendment to the U.S. Constitution, which includes the clause: "nor shall any State deprive any person of life, liberty, or property without due process of law;" USCS Constitution, Amendment 14.

STATEMENT

1. Background

Mrs. Behrman, the plaintiff in a no-

fault divorce action, was granted a judgment of Divorce Nisi on October 3, 1985 (App. ~~X~~^E, pp. A-9 -A-10, *infra*). Included in that judgment was an order that Mr. Behrman, the defendant-petitioner, pay a portion of the plaintiff's counsel fees as provided under Massachusetts G.L. c. 208, §38, which states that "in any proceeding under this chapter, whether original or subsidiary, the court may, in its discretion, award costs and expenses, or either, to either party, whether or not the marital relation has terminated.

No trial was ever held, as the parties had reached agreements concerning all issues except responsibility for counsel fees. The counsel fees for both parties were substantial due to the occurrence of a large number of pretrial pleadings resulting from:

1. the inability of the parties to reach agreements concerning physical

and legal custody of the parties' child, visitation, and division of property;

2. postponement by the court of the scheduled trial date until over two years had passed from the plaintiff's initial motion for divorce;
- and 3. changing circumstances over the period preceding the rescheduled trial date.

The pretrial pleadings consisted of hurried, informal hearings held before several different judges without the recording of any transcripts.

On August 15, 1985, after all other issues had been settled, plaintiff filed a motion for counsel fees accompanied by a memorandum in support of costs. On September 4, 1985, defendant responded with a motion of defendant for counsel fees accompanied by a memorandum in opposition to

plaintiff's motion and in support of his motion.

2. Probate Court Order

On October 3, 1985, without any hearing, the probate court issued the order that the defendant pay a portion of the plaintiff's counsel fees, citing defendant's "numerous, duplicative and non-meritorious pleadings" (App. ^DX, pp. A-7 - A-8, *infra*). The defendant at no time had an opportunity to introduce evidence refuting this judgment. Furthermore, the basis of the figure selected by the court to be paid by the defendant was not explained.

3. Appeals in State Courts

Defendant, acting as his own attorney, filed a timely appeal to the Commonwealth of Massachusetts Appeals Court contending that the Probate Court Order lacked merit and violated accepted court principles.

The defendant's brief included contentions that he was not permitted to present oral testimony or to cross-examine the plaintiff. It also contended that "court did not and cannot relate" the figure ordered to be paid by the defendant to the actual costs associated with the pleadings cited in the order. On November 28, 1986, the Appeals Court issued a summary disposition under Rule 1:28 of the Massachusetts Appeals Court Rules affirming the order and denying the opportunity for oral argument (App. A, pp. A-1 - A-4, *infra*). The ruling further cited several cases concerned with the issue of whether an attorney is entitled to collect fees he earned instead of the pertinent issue of by whom he should be paid. It further stated that "in such cases as this the judge is not required to hold an evidentiary hearing," and cited a reference to a case (Robbins v. Robbins, 476 NE 2d,

230 (1985)) which referenced a second case (Ross v. Ross, 430 NE 2d 815 (1982)) wherein a hearing was not deemed necessary because, in that case, a trial and masters report concerning counsel fees were already on the record.

On December 7, 1986, defendant filed a timely Petition for Rehearing citing the apparent misunderstanding by the Appeals Court of the issues in the case, citing the lack of opportunities for presentation of evidence, and raising the contention that defendants in Massachusetts no-fault divorce cases who agree to settle the custody, visitation and property issues of their cases without trials are apparently subject "to the liability of a punitive assessment of attorney fees based on a judgment inherently made without affording the protections of due process of law." This petition was denied by the Appeals Court on January 7, 1987 (App. ^B~~A~~, p. A-5).

Defendant filed a timely Application for Leave to Obtain Further Appellant Review to the Commonwealth of Massachusetts Supreme Judicial Court which included further contentions that his right to due process under both the Massachusetts Constitution and the 14th Amendment to the U.S. Constitution had been violated by the order to deprive him of property without a hearing to permit him the opportunity to present evidence, cross-examine witnesses, and generate a factual record. This Application for Further Review was denied by the Supreme Judicial Court on January 28, 1987 (App. ^CA, p. A-6, *infra*).

REASONS FOR GRANTING THE WRIT

In this case, a state court of last resort has denied petitioner's Application to Review an important question on which the state courts have ruled in conflict

with previous federal and state court rulings: the right of a defendant to a fair hearing before being deprived of property.

The court has previously stated in Fuentes v. Shevin, 92 S. Ct. 1983(1972) that "the rather ordinary costs in time, effort and expense resulting from hearing held prior to deprivation of property interest cannot outweigh the constitutional right to a hearing." A "fair hearing" has been commonly cited in court decisions as a requirement for "due process"; People v. Coates, 59 NW 2d 83 (1953); Lane v. Warden, Md. Penitentiary, 320 F. 2d 179 (1963); People v. Weaver, 412 NE 2d 1353 (1980).

The court in Brown v. Brown, 422 P.2d 634 (1967) stated: "Black's Law Dictionary, (3d ed.) defines a 'hearing' as 'technically the trial of the case, including the introduction of evidence, the argument of the solicitors, and the decree of the chancel-

lor.' 'The word contemplates not only the privilege to be present when the matter is being considered but the right to present one's contention and to support the same by proof and argument.'" The Fifth Edition of Black's Law Dictionary (p. 537) defines the term "fair hearing" as "one in which authority is fairly exercised; that is, consistently with the fundamental principles of justice embraced within the conception of due process of law. Contemplated in a fair hearing is the right to present evidence, to cross-examine, and to have findings supported by evidence." This definition is supported by several rulings cited in Jeffries v. Olesen, 121 F. Supp. 463.

Due process, guaranteed by the Fourteenth Amendment of the U.S. Constitution, guarantees the rights essential to a fair hearing and requires that there be an opportunity to present every available de-

fense; Lindsey v. Normet, 405 US 56 (1972). Yet the Massachusetts courts permit a judge to deprive a defendant of property by making judgments which defendant has never had an opportunity to refute. The only opportunity given for the presentation of evidence in the case at hand after plaintiff's motion for counsel fees was filed was the opportunity for each party to file a memorandum; these memoranda did not focus on the specific pleadings cited by the judge in his order, which could not have been anticipated as the key issues affecting his ruling. The only other testimony presented during the duration of the case was testimony presented during pretrial motions by both parties; this testimony, portions of which were presented before several different judges over a two-year time period, covered a wide range of subjects, was unsworn, unrecorded by transcript, and incom-

plete due to courtroom time constraints.

Due process also requires that a hearing, to be meaningful, offers reasonable opportunity to correct error; Citta v. Delaware Valley Hospital, 313 F. Supp. 301 (1970). No such opportunity existed here where no record of a fair hearing exists.

There is clearly a need for the Supreme Court to clarify whether a fair hearing is required before a probate court judge can require a party to pay his adversary's counsel fees in divorce cases which are settled without trial. In view of the growing number of no-fault divorces, resolution of this question will help prevent future abuse of judicial discretion and prevent much needless future litigation.

A second issue in this case also merits consideration for the granting of a writ of certiorari on the grounds that a state court of last resort has decided the fol-

lowing federal question in a way in conflict with a federal court of appeals: the right of a defendant to an explanation by the "trial judge" of considerations used to determine the amount of property he is to be deprived of.

This issue has previously been decided in Lee v. Lee, 537 F. 2d 762(1976), which concluded clearly that trial judge must explain considerations that enter into his decisions regarding attorney's fees in order to provide basis for appellate review and, in a case where only explanation offered by court was that 50 hours appeared "more reasonable" than the 77 hours claimed by counsel in its affidavit, counsel fee provision of judgment of divorce would be vacated and cause remanded.

Probate Court orders to pay the counsel fees of an adversary which do not explain the basis of the amount awarded as it re-

lates to the underlying judgment provide no basis for appellate review, and a ruling on this issue in the case at hand would help prevent future abuse of judicial discretion.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted.

Respectfully submitted,

BRADLEY W. BEHRMAN

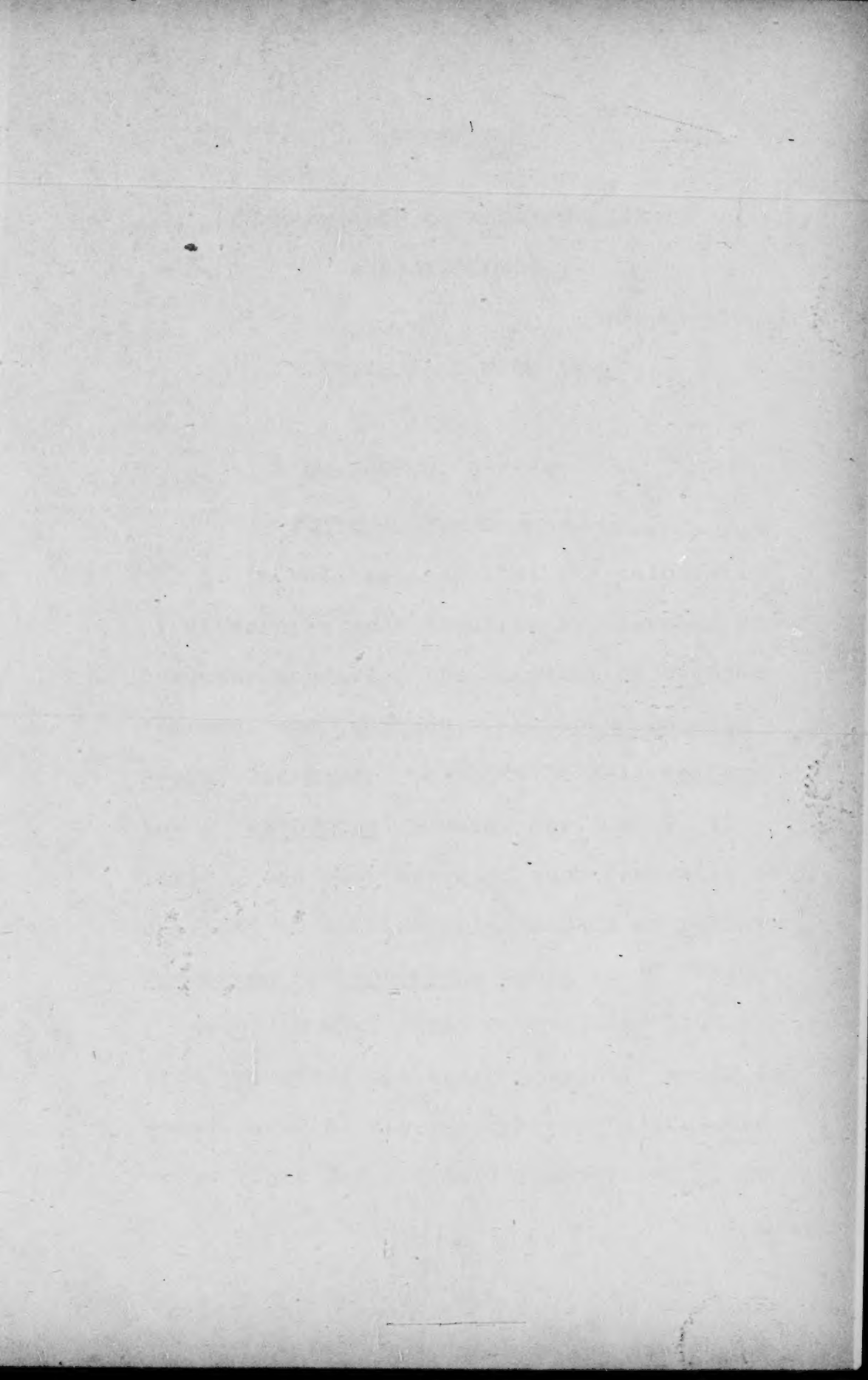
(pro se)

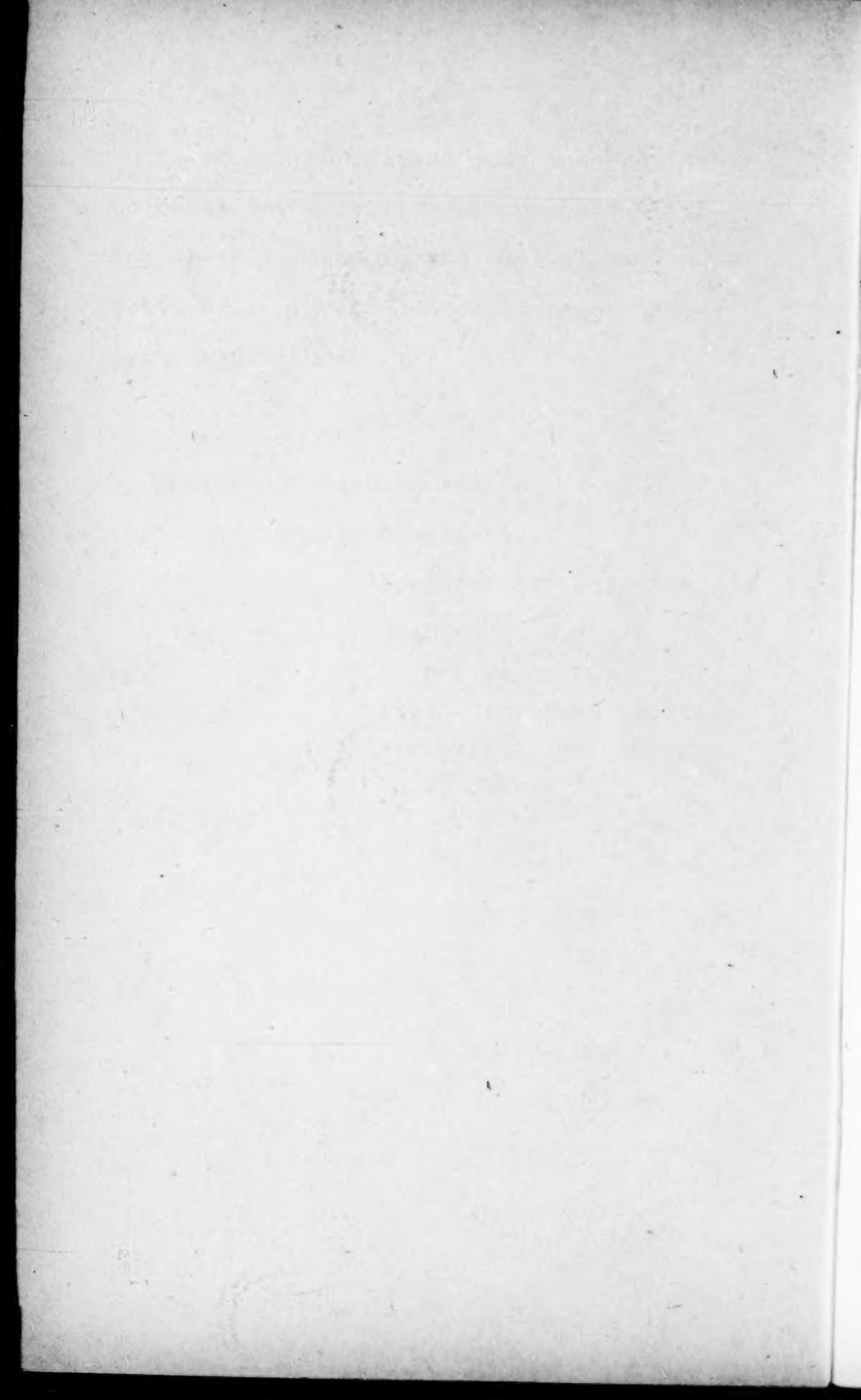
18275 Jamestown Circle

Northville, MI 48167

(313) 349-3675

April 1987





APPENDIX A

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

No. 86-550

VERONICA L. BEHRMAN

VS.

BRADLEY W. BEHRMAN.

MEMORANDUM AND ORDER

It is well settled that the calculation of attorney's fees requires an exercise of judgment involving the application of many factors, see Cummings v. National Shawmut Bank, 284 Mass. 563, 569 (1933); Pemberton v. Pemberton, 9 Mass. App. Ct. 9, 17 (1980), and that award of such fees will be entitled to considerable respect on review. Pemberton v. Pemberton, supra at 17. Kane v. Kane, 13 Mass. App. Ct. 557, 560 (1982). "The amount of the award generally rests in sound judicial discretion, may be presumed to be right and ordinarily ought not to be

disturbed." Meghreblian v. Meghreblian, 13 Mass. App. Ct. 1021, 1023-1024 (1982).

In the instant matter, the same judge who heard the parties' divorce action also heard many of the husband's earlier motions (a significant number of which were characterized by the court as being "duplicative and non-meritorious").^{1/} The judge was able to observe firsthand the skill and performance of counsel and the results achieved by them, see Edinburg v. Edinburg, 22 Mass. App. Ct. 192, 198 (1986); Robbins v. Robbins, 22 Mass. App. Ct. 982, 983 (1986), and also had before him the detailed time records of the wife's counsel. See Edinburg v. Edinburg, supra at 198 n.17. Moreover, the court had knowledge of the parties' financial positions and stated

^{1/}We do not have before us the transcripts of the hearings on those motions. However, the husband himself admits in his brief that certain motions filed by him "would probably not have been filed had the courtroom appearance not been necessitated by the priority motion."

that the award could be paid by the husband from his share of the net proceeds arising from the sale of the former marital residence. See Kane v. Kane, 13 Mass. App. Ct. at 561; Davidson v. Davidson, 19 Mass. App. Ct. 364, 378 (1985); Robbins v. Robbins, 22 Mass. App. Ct. at 983.

In the circumstances here present, we are satisfied that the order, incorporated in the judgment nisi, requiring the husband to pay \$1425 to the wife's attorney ^{2/}✓ was reasonable and that the judge "dwelt on the relevant considerations" Robbins v. Robbins, 19 Mass. App. Ct. 538, 543 (1985). We note also that in such cases as this the judge is not required to hold an evidentiary hearing. See Edinburg v. Edinburg, 22 Mass. App. Ct. at 198; Robbins v. Robbins, 19 Mass. App. Ct. at 543 n.10.

^{2/}✓ The counsel fee award constitutes only fifteen percent of the wife's total counsel fees.

The wife is to have double costs on this appeal and reasonable attorney fees for the appeal, in an amount to be determined by the Probate Court.

Therefore, upon consideration of the appendices and briefs it is ordered, under the provisions of Rule 1:28 of this court, that the following entry be made on the docket of the Probate court in the above matter:

Judgment affirmed.

By the Court

(Perretta, Cutter &
Smith, JJ.),

/s/ Nancy Foley
Clerk

Entered: November 28, 1986

APPENDIX B

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

No. 86-550

VERONICA L. BEHRMAN

vs.

BRADLEY W. BEHRMAN.

ORDER

The petition for rehearing filed by the appellant having been considered it is ordered that the said petition be, and the same hereby is, denied.

By the Court (Perretta,
Cutter & Smith, JJ.),

/s/ Grubert Quigly
Assistant Clerk

Entered: January 7, 1987.

APPENDIX C

SUPREME JUDICIAL COURT FOR THE COMMONWEALTH

OFFICE OF THE CLERK, 1412 COURT HOUSE,

BOSTON 02108, (617) 725-8055

No. FAR-4126

JAN 28, 1987

VERONICA L. BEHRMAN

VS.

BRADLEY W. BEHRMAN

MOTION to File Reduced Number of Copies-
of Application. ALLOWED

In the Application for Further Review an
Order has been entered that the Appli-
cation is DENIED

Jean M. Kennett, Clerk

APPENDIX D

COMMONWEALTH OF MASSACHUSETTS

THE TRIAL COURT

THE PROBATE AND FAMILY COURT DEPARTMENT

NORFOLK Division Docket No. 83M0755-D1

ORDER (Motion for Counsel Fees)

Veronica L. Behrman, Plaintiff

v.

Bradley W. Behrman, Defendant

This action came on for (trial)(Hearing)
before the Court, KOPELMAN, Justice pre-
siding, ~~and the issues having been duly~~
~~tried)(heard) and findings having been~~
~~duly rendered.~~

It is Ordered and ~~Adjudged~~: that the hus-
band shall pay forthwith towards the wife's
counsel fees, directly to her attorney,
Paul D. Maggioni, the sum of \$1,425 pursu-
ant to the provisions of G.L. c. 208, §38.
These fees are awarded primarily, but not

exclusively, on account of the husband's numerous, duplicative and non-meritorious pleadings which include, inter alia; motions to reduce temporary support, terminate child support, provide him with alimony, have the minor child removed from her current school and to continue the trial date.

Said counsel fees in the amount of \$1,425 may be paid out of the husband's share of the net proceeds arising out of the sale of the former marital residence.

October 3, 1985

Date

/s/ Daniel H. Kopelman

Justice of the Probate
and Family Court

APPENDIX E

COMMONWEALTH OF MASSACHUSETTS

THE TRIAL COURT

Norfolk Division PROBATE AND FAMILY COURT

Veronica Behrman Plaintiff— No. 83M0755-D1
of Narragansett in the State of Rhode Island

v. Judgment of Divorce Nisi

Bradley W. Behrman Defendant
of Plainville in the County of Norfolk

All persons interested having been notified in accordance with law and after hearing it is adjudged nisi that a divorce from the bond of matrimony be granted the said plaintiff for the cause of an irretrievable breakdown of the marriage under G.L. c. 208, §;-B; the Court finds that there has existed from the period following the filing of the complaint and up to the date of the hearing, a continuing irretrievable breakdown of the marriage, as provided by Chapter 208 ss 1-2 and that upon and after the expiration of

ninety days from the entry of this judgment it shall become and be absolute unless, upon the application of any person within such period, the Court shall otherwise order, and it is further ordered that the Agreements dated August 12, 1985 and August 14, 1985 are incorporated and made a part of this judgment, are merged herein and are deemed to have no independent legal significance.

It is further ordered that the husband shall forthwith pay towards the wife's counsel fees, directly to her attorney, Paul D. Maggioni, the sum of \$1,425 pursuant to the provisions of G.L. c. 208, § 38. Said counsel fees in the amount of \$1,425 may be paid out of the husband's share of the net proceeds arising out of the sale of the former marital residence.

All until the further order of the Court.

October 3, 1985 /s/ Daniel H. Kopelman

Date

Justice of the Probate and
Family Court



No. 86-1731.

Supreme Court, U.S.
FILED

MAY 28 1987

JOSEPH F. SPANIOLO, JR.
CLERK

**In the
Supreme Court of the United States.**

OCTOBER TERM, 1986.

BRADLEY W. BEHRMAN,
PETITIONER,

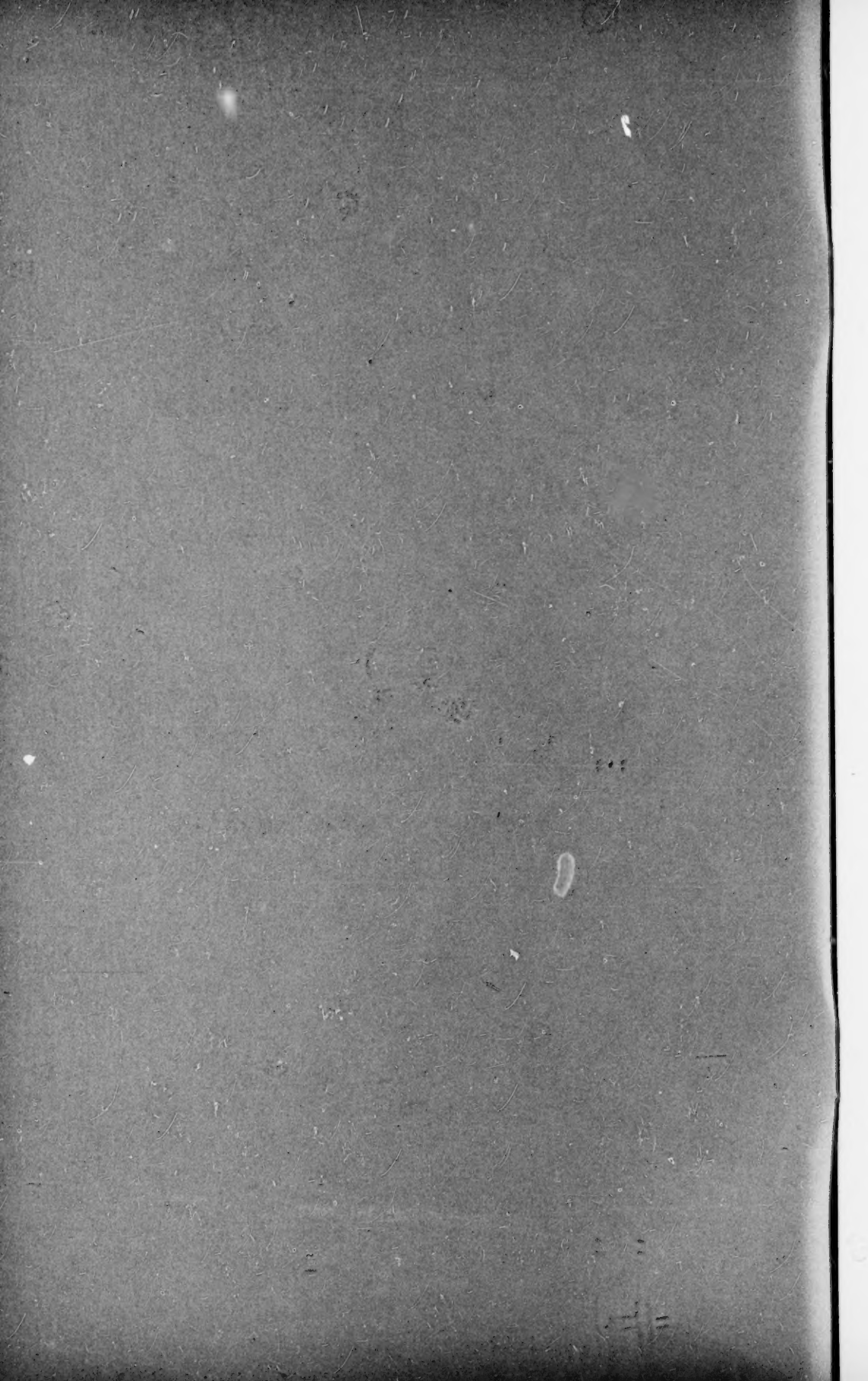
v.

VERONICA L. BEHRMAN,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME JUDICIAL COURT OF MASSACHUSETTS.

Respondent's Brief in Opposition.

PAUL D. MAGGIONI,
395 Washington Street,
Dedham, Massachusetts 02026.
(617) 326-9448
Counsel of Record



Questions Presented.

- 1.) Is there a deprivation of due process when a defendant in a divorce action, represented by Counsel in the Trial Court, in response to a Motion for Costs filed in accordance with Massachusetts General Law Chapter 208, section 38, after being granted one week to file a response did in fact respond with a Memorandum in Opposition and Cross-Motion for Counsel Fees nineteen (19) days after the original Motion was filed?
- 2.) Is there an unconstitutional deprivation of due process when the Court awards counsel fees on account of the husband's numerous, duplicative and non-meritorious pleadings?

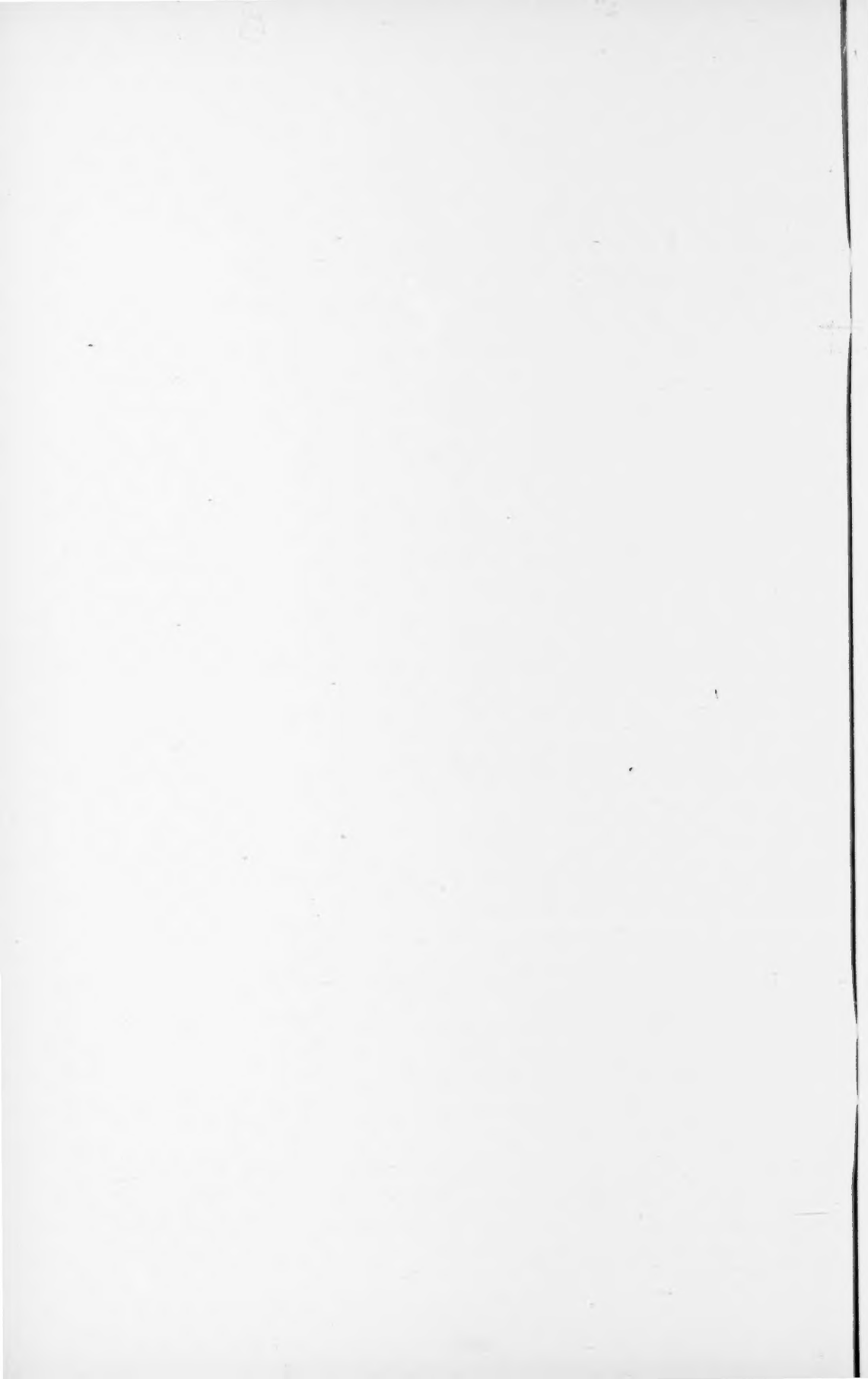


Table of Contents

Opinions Below, Prior Orders of this Court and Jurisdiction	2
Opinions and Judgments delivered in Courts Below	2
Constitutional, Statutory and By-Law Provisions	2
Statement of the case	3
Argument	7
I. No constitutional question was raised by the Appellant in the Courts below	7
II. The issues of fact determined by the courts below foreclose the petitioner's arguments	12
III. This Court has denied certiorari cases raising the issues contained in this petition	15
Conclusion	17
Addendum	19

Table of Authorities Cited

Cases

<u>Caldwell v. Caldwell</u> , 17 Mass. App. Ct. 1032 (1984)	10
<u>Clifford v. Clifford</u> , 354 Mass. 545 (1968)	5,9
<u>Cummings v. National Shawmut Bank of Boston</u> , 284 Mass. 563 (1933)	7,10
<u>Hayden v. Hayden</u> , 326 Mass. 587 (1950)	9
<u>Hyde v. Van Wormer</u> , ____ U.S. ____, 106 S. Ct. 403, 88 L.Ed.2d 355 (1985)	16
<u>Meghreblian v. Meghreblian</u> , 13 Mass. App. Ct. 1021 (1982)	10
<u>Pemberton v. Pemberton</u> , 9 Mass. App. Ct. 9 (1983)	10
<u>Ross v. Ross</u> , 385 Mass. 30 (1982)	10
<u>State v. Ralph Williams' Northwest Chrysler Plymouth, Inc.</u> , 553 P.2d 423, 87 Wash. 2d 298, <u>cert. denied</u> , 430 U.S. 952, 97 S. Ct. 1594, 51 L.Ed.2d 801 (1976)	16

iii.

<u>Toepfer v. Department of Transportation,</u> <u>FAA, 792 F.2d 1102 (Fed. Cir. 1986)</u>	15
---	----

Statutes

Massachusetts General Laws

c. 208, § 38	8,19
c. 231, § 6F	8

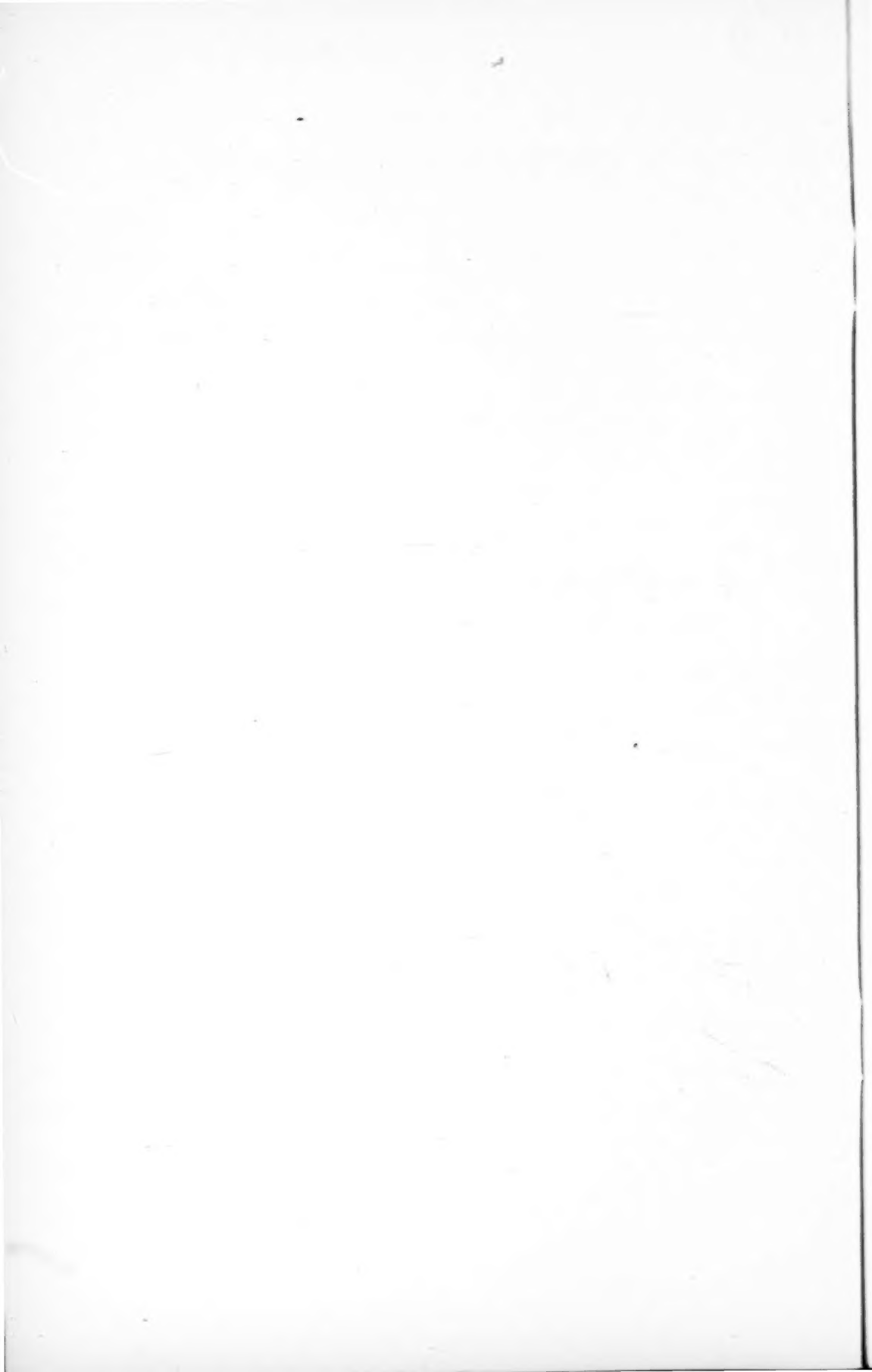
Court Rules

Massachusetts Appeals Court

Rule 1:28	20
-----------	----

Rules of Appellate Procedure

Rule 27	21
Rule 27.1	24



SUPREME COURT OF THE UNITED STATES

October Term, 1986

No. 86-1731

BRADLEY W. BEHRMAN,
Petitioner,

V.

VERONICA L. BEHRMAN,
Respondent,

On Petition for a Writ of Certiorari to the
Supreme Judicial Court of Massachusetts

BRIEF FOR RESPONDENT IN OPPOSITION

Opinions Below, Prior Order of this Court
and Jurisdiction

These matters are set forth in the Petition.

Opinions and Judgments delivered in Courts
Below

The decision of the Appeals Court dated November 28, 1986 affirming the judgment of the Trial Court was reported in 23 Mass. App. Ct. 1104 (1986).

The decision of the Supreme Judicial Court dated January 28, 1987 denying Further Appellate Review was reported in 399 Mass. 1101 (1987).

Constitutional, Statutory and By-Law
Provisions

The relevant constitutional, statutory and rules of court provisions are set out in the addendum.

Statement of the case

On May 9, 1983 the Respondent commenced this action for Divorce. On October 3, 1985 Judgment Nisi incorporating agreements dated August 12, 1985 and August 14, 1985 was entered together with the further order allowing the Respondent's Motion for Counsel Fees. On October 23, 1985 the Petitioner filed his notice of appeal of the award of Attorneys fees to the Massachusetts Appeals Court.

The Respondent at the trial filed her Motion for Counsel Fees, Affidavit of Counsel as to time and charges and Memorandum in Support of Motion for Counsel Fees. Following receipt of Petitioner's Memorandum dated September 4, 1985, the Respondent filed a further statement in response to the Petitioner's Memorandum.

4.

This case involves the exercise by the Trial Court Judge of a statutory power to award counsel fees. The statute General Laws Chapter 208, section 38 gives the Judge discretion to award costs and expenses to either party or his or her counsel whether the marital relationship has been terminated or not.

The statute is silent on the requirements for notice, formality of hearing and form of judgment.

The standard of review in the State Appellate Court has evolved into well defined criteria and procedures of which the petitioner's counsel in the Court below was well aware and followed.

The respondent's Motion for Counsel Fees was presented to the Court following two days of negotiated settlement prior to trial.

5.

Counsel for the petitioner was afforded one week to file any desired response to the Motion for Counsel Fees and did in fact submit a thirteen (13) page Memorandum in Opposition to respondent's Motion together with a cross-motion for counsel fees which was not allowed.

Review of the decision of the Probate Court by the Appeals Court is limited to questions of law and the trial court's award ordinarily must stand unless incommensurate with an objective evaluation of the services performed. Clifford v. Clifford, 354 Mass. 545, 548 (1968).

The petitioner while represented by counsel made no motion, effort or attempt to request a hearing on the issue of counsel fees.

6.

The Trial Judge who presided at most of the pre-trial motions in this case was uniquely qualified to evaluate the quality and quantity of the petitioner's motions.

The petitioner's statement (B.4-5) supports the statement that petitioner some twenty (20) days after the respondent's motion was filed through his counsel filed both his Memorandum and Motion for Counsel Fees.

The determination of the Trial Judge was made after presentation to him of Affidavits of Counsel documenting legal costs and expenses in excess of \$9,600. The award by the Judge was \$1,425. The petitioner's Motion for Counsel Fees requested the Court to award a total of \$21,807.65 for the petitioner's counsel fees.

ARGUMENT

I. NO CONSTITUTIONAL QUESTION WAS RAISED BY THE APPELLANT IN THE COURTS BELOW.

In the Trial Court, recognizing the difficulty both Counsel and the Trial Court have in addressing the issue of counsel fees, the Massachusetts Courts many years ago established certain ground rules for determining counsel fees; and by statute it has been left to the Trial Judges' discretion whether or not to award such fees.

The case of Cummings v National Shawmut Bank, 284 Mass. 563, 569 (1933) was cited to the Trial Judge by counsel for the Respondent in a Memorandum supporting the Motion for Counsel Fees.

The same case was cited by the Appeals Court in the Memorandum accompanying its summary dismissal.

8.

The case addresses the criteria to be addressed by the Trial Judge.

The statutes G.L. C.208, s.38 Award of Costs and G.L. C.231, s.6F Costs for Insubstantial or Frivolous Defenses set the authority for the Trial Judge in his discretion to make such award.

Here the Trial Judge certainly did determine in very definite language his reason for his award stating (A. 7-8):

"These fees are awarded primarily, but not exclusively, on account of the husband's numerous, duplicative, and non-meritorious pleadings. . ."

With respect to Counsel Fees the Appellate Courts have so often defined the rule, it is repeated here only as the standard for analysis of the Trial Court action.

9.

"...(T)he court now undoubtedly has power to award costs and expenses, which may include counsel fees and may order them to be paid to counsel for the opposing party."

Hayden v. Hayden, 326 Mass. 587, 594

(1950)

The amount awarded as counsel fees is within the discretion of the court.

Clifford v. Clifford, 354 Mass. 545, 548

(1968)

"As long as the amount awarded is not incommensurate with an objective evaluation of the services performed, and our inspection of the record shows it was not, `(t)he award...may be presumed to be right and ordinarily ought not to be disturbed." (citations omitted)

10.

Ross v. Ross, 385 Mass. 30, 38-39 (1982)

"The award, of course, is not to be changed unless an abuse of discretion on the Judge's part is evident from a demonstration that the amount set is clearly incommensurate with an objective evaluation of the services performed."
Pemberton v. Pemberton, 9 Mass. App. Ct.

9, 16 (1983)

The criteria to be applied have been enunciated in the case of Cummings v.

National Shawmut Bank of Boston, 284 Mass. 563, 569 (1933) and repeated in Pemberton.

Because the decision of the probate Judge involves an exercise of judgment, in the application of variables, it will be entitled to a large measure of respect on review."

Pemberton, supra at P. 17

Meghreblian v. Meghreblian, 13 Mass. App. Ct. 1021, 1023-1024 (1982).

Caldwell v. Caldwell, 17 Mass. App. Ct. 1032, 1035 (1984).

11.

The record in the Appeals Court indicated that the Trial Judge allowed as chargeable counsel fees an amount equivalent to approximately 15% of the Plaintiff's actual counsel fees and stated that the award was made because of numerous, duplicative and non-meritorious pleadings which included repeated motions to take the child out of a parochial school and place the child in a public school (which Judge Kopelman denied), repeated motions to reduce child support, terminate child support, establish criteria for custody and the like which were, with few exceptions, all previously addressed by the same Trial Judge.

Addressing solely the issue of costs, the Trial Court followed every standard prescribed by the Appellate Courts of Massachusetts.

12.

With all due respect to the Appellant's desire to prolong the litigation, the Appeals Court determined that there was no error of law and accordingly there was no basis for appellate review and the Supreme Judicial Court agreed.

II. THE ISSUES OF FACT DETERMINED BY THE COURTS BELOW FORECLOSE THE PETITIONER'S ARGUMENTS.

The Petitioner-Appellant attempts to raise an issue of due process by claiming denial of a hearing.

The Appeals' Court decision stated simply (A.-3):

"We note also that in such cases as this, the Judge is not required to hold an evidentiary hearing."

The cases cited by the Appeals Court refer to circumstances similar to this case where the Trial Judge was at least as familiar with the facts of the case as were counsel and also the parties.

In truth, the Petitioner on the Motion for Counsel Fees was represented by counsel and so stated in his brief (B-4).

"On September 4, 1985, Defendant responded with a Motion of Defendant for Counsel Fees accompanied by a Memorandum in opposition to Plaintiff's Motion and in support of his motion."

Not only was Petitioner represented by Counsel who took twenty (20) days to respond to the Motion for Counsel Fees when the Trial Judge suggested one week; but he also submitted a Motion for Petitioner-Husband's counsel fees which were more than double the Respondent-Wife's Motion for Counsel Fees.

Because of the arguments raised by the Petitioner's opposition brief, Counsel for the Respondent-Wife was allowed to file a reply brief; and only after both parties no longer requested further hearings, did the Trial Judge rule on the Motion. The Ruling, dated October 3, 1985, indicates that twenty-nine days elapsed from the time Petitioner's counsel filed his brief and forty-nine days elapsed from the time the original Motion for Costs was submitted.

Not only was Petitioner represented by counsel, not only did counsel raise every issue Petitioner now contends he should have had the opportunity to raise, but almost seven (7) weeks transpired during this period of time Petitioner contends he was not allowed to contest the Motion.

The fact that was obvious to the Trial Judge, the Appeals Court, the Supreme Judicial Court and virtually everyone save the Petitioner was that he did contest the Motion and having taken his best shot he still lost.

III. THIS COURT HAS DENIED CERTIORARI TO CASES RAISING THE ISSUES CONTAINED IN THIS PETITION.

Lower Courts have routinely determined that there is no denial of due process where there is no hearing on the issues of costs.

Toepfer v. Department of
Transportation FAA, 792 F2d 1102,
1103 (Fed. Cir. 1986)

"To require a Hearing for the assessment of such damages and costs would impose on the opposing party and on the Court an even greater burden in dealing with a frivolous appeal and defeat the purpose of Rule 38. See e.g., Hyde v. Van Wormer, ____ U.S. ____, 106 S. Ct. 403, 88 L.Ed.2d 355 (1985)- (Supreme Court awarded damages under its Rule 49.2 without a hearing)."

Very few of such cases rise to the certiorari level. One such case which did and in which certiorari was denied is:

State v. Ralph Williams' Northwest Chrysler Plymouth, Inc., 553 P.2d 423, 87 Wash. 2d 298, cert. denied, 430 U.S. 952, 97 S.Ct. 1594, 51 L.Ed.2d 809 (1976).

17.

Conclusion

For the foregoing reasons, this Petition
for a Writ of Certiorari should be denied.

Respectfully submitted,

PAUL D. MAGGIONI
Counsel of Record
395 Washington Street
P.O. Box 505
Dedham, Massachusetts 02026
(617) 326-9448

18.

ADDENDUM

Massachusetts General Laws

Chapter 208

208.38. Costs.

Section 38. In any proceeding under this chapter, whether original or subsidiary, the court may, in its discretion, award costs and expenses, or either, to either party, whether or not the marital relation has terminated. In any case wherein costs and expenses, or either, may be awarded hereunder to a party, they may be awarded to his or her counsel, or may be apportioned between them.

COURT RULESAPPEALS COURT RULESRule 1:28. Summary Disposition.

At any time following the filing of the appendix (or the filing of the original record) and the briefs of the parties on any appeal in accordance with the applicable provisions of Rules 14(b), 18 and 19 of the Massachusetts Rules of Appellate Procedure, a panel of the justices of this court may determine that no substantial question of law is presented by the appeal or that some clear error of law has been committed which has injuriously affected the substantial rights of an appellant and may, by its written order, affirm, modify or reverse the action of the court below.

The panel will provide an opportunity for oral argument before disposing of criminal cases under this rule but need not do so in civil cases. Any order entered under this rule shall be subject to the provisions of Rules 27 and 27.1 of the Massachusetts Rules of Appellate Procedure.

RULES OF APPELLATE PROCEDURE

Rule 27. Petition for Rehearing.

(a) Time for Filing; Content; Answer; Action by Court if Granted. A petition for rehearing should be filed with the clerk of the appellate court within fourteen days after the date of the rescript unless the time is shortened or enlarged by order. It shall state with particularity the points of law or fact which it is contended the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires to

present. Oral argument in support of a petition will not be permitted, except by order of the court.

No answer to a petition for rehearing will be received unless requested by the appellate court but a petition for rehearing will ordinarily not be granted in the absence of such a request. If a petition for rehearing is granted the appellate court may make a final disposition of the cause without reargument or may restore it to the calendar for reargument or resubmission or may make such other orders as are deemed appropriate under the circumstances of the particular case. Action upon a petition is wholly in the discretion of the full court; and the court may award costs, including a reasonable attorney's fee to the prevailing party.

(b) Form of Petition; Length. The petition shall be in a form of a letter to the chief justice of the Appellate Court with seven clear and legible copies, and additional copies shall be mailed by first class mail or delivered to all other counsels. Except by permission of the court, a petition for rehearing shall not exceed ten pages of standard typewritten material.

(c) Revision of Decision. Upon consideration of a petition for rehearing, a majority of the justices of the appellate court may in writing order a decision of the court (or a panel thereof) to be reviewed and revised by a majority of the justices of the court.

Rule 27.1. Further Appellate Review.

(a) Application; When Filed; Grounds.

Within twenty days after the date of the rescript of the Appeals Court any party to the appeal may file an application for leave to obtain further appellate review of the case by the full Supreme Judicial Court. Such application shall be founded upon substantial reasons affecting the public interest or the interests of justice. Oral argument in support of an application shall not be permitted except by order of the court.

(b) Contents of Application; Form. The application for leave to obtain further appellate review shall contain, in the following order:

25.

(1) a request for leave to obtain further appellate review; (2) a statement of prior proceedings in the case; (3) a short statement of facts relevant to the appeal (but facts correctly stated in the opinion, if any, of the Appeals Court shall not be restated); (4) a statement of the points with respect to which further appellate review of the decision of the appeals court is sought; and (5) a brief statement (covering not more than ten pages of typing), including appropriate authorities, indicating why further appellate review is appropriate. A copy of the rescript and opinion, if any, if the Appeals Court shall be appended to the application. The application shall comply with the requirement of Rule 20.

(c) Opposition; Form. Within ten days after the filing of the application, any other party to the appeal may, but need not, file and serve an opposition thereto (covering not more than ten pages of typing) setting forth reasons why the application should not be granted. The opposition shall not restate matters described in subdivision (b) (2) and (3) of this rule unless the opposing party is dissatisfied with the statement thereof contained in the application. An application shall comply with the requirements of Rule 20.

(d) Filing; Service. One copy of the application and one copy of each opposition shall be filed in the office of the clerk of the Appeals Court. Fourteen copies of the application, and fourteen copies of each

opposition shall be filed in the office of the Clerk of the full Supreme Judicial Court.

Filing and service of the application and of any opposition shall comply with Rule 13.

(e) Order of Further Appellate Review; Certification. If any three justices of the Supreme Judicial Court shall sign an order for further appellate review for substantial reasons affecting the public interests of justice, or if a majority of the justices of the Appeals Court or a majority of the justices of the Appeals Court deciding the case shall certify that the public interest or the interests of justice make desirable a further appellate review, the order or certificate, as the case may be, shall be transmitted to the Clerk of the Appeals Court; upon receipt, further appellate review shall be deemed granted.

28.

The clerk shall forthwith transmit to the clerk of the full Supreme Judicial Court all papers theretofore filed in the case and shall notify the clerk of the lower court that leave to obtain further appellate review has been granted.

(f) Any party may apply to the Supreme Judicial Court within ten days of the granting of further appellate review for permission to file a separate or supplemental brief in the Supreme Judicial Court. If the application is granted, the court may impose terms as to the length and filing of such brief and any response thereto. If such permission is denied or not sought, cases in which further appellate review has been granted shall be argued on the briefs and appendix filed in the Appeals Court.

